

Securities and Exchange Commission

§ 230.159A

under section 11 of the Act of the issuer and any such underwriter only at the time of or next preceding a particular sale of the issuer's registered securities to the public determined pursuant to Rule 430B (§ 230.430B).

(d) If an earnings statement was made available by "other methods" than those specified in paragraphs (a) and (b) of this section, the earnings statement must be filed as exhibit 99 to the next periodic report required by section 13 or 15(d) of the Exchange Act covering the period in which the earnings statement was released.

[48 FR 44770, Sept. 30, 1983, as amended at 56 FR 30054, July 1, 1991; 58 FR 14669, Mar. 18, 1993; 70 FR 44804, Aug. 3, 2005; 73 FR 967, Jan. 4, 2008]

§ 230.159 Information available to purchaser at time of contract of sale.

(a) For purposes of section 12(a)(2) of the Act only, and without affecting any other rights a purchaser may have, for purposes of determining whether a prospectus or oral statement included an untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading at the time of sale (including, without limitation, a contract of sale), any information conveyed to the purchaser only after such time of sale (including such contract of sale) will not be taken into account.

(b) For purposes of section 17(a)(2) of the Act only, and without affecting any other rights the Commission may have to enforce that section, for purposes of determining whether a statement includes or represents any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading at the time of sale (including, without limitation, a contract of sale), any information conveyed to the purchaser only after such time of sale (including such contract of sale) will not be taken into account.

(c) For purposes of section 12(a)(2) of the Act only, knowing of such untruth or omission in respect of a sale (including, without limitation, a contract of

sale), means knowing at the time of such sale (including such contract of sale).

[70 FR 44804, Aug. 3, 2005]

§ 230.159A Certain definitions for purposes of section 12(a)(2) of the Act.

(a) *Definition of seller for purposes of section 12(a)(2) of the Act.* For purposes of section 12(a)(2) of the Act only, in a primary offering of securities of the issuer, regardless of the underwriting method used to sell the issuer's securities, *seller* shall include the issuer of the securities sold to a person as part of the initial distribution of such securities, and the issuer shall be considered to offer or sell the securities to such person, if the securities are offered or sold to such person by means of any of the following communications:

(1) Any preliminary prospectus or prospectus of the issuer relating to the offering required to be filed pursuant to Rule 424 (§ 230.424) or Rule 497 (§ 230.497);

(2) Any free writing prospectus as defined in Rule 405 (§ 230.405) relating to the offering prepared by or on behalf of the issuer or used or referred to by the issuer and, in the case of an issuer that is an open-end management company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*), any summary prospectus relating to the offering provided pursuant to Rule 498 (§ 230.498);

(3) The portion of any other free writing prospectus (or, in the case of an issuer that is an investment company registered under the Investment Company Act of 1940 or a business development company as defined in section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(48)), any advertisement pursuant to Rule 482 (§ 230.482)) relating to the offering containing material information about the issuer or its securities provided by or on behalf of the issuer; and

(4) Any other communication that is an offer in the offering made by the issuer to such person.

NOTES TO PARAGRAPH (a) OF RULE 159A. 1. For purposes of paragraph (a) of this section, information is provided or a communication is made by or on behalf of an issuer if an issuer or an agent or representative of the

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issuer authorizes or approves the information or communication before its provision or use. An offering participant other than the issuer shall not be an agent or representative of the issuer solely by virtue of its acting as an offering participant.

2. Paragraph (a) of this section shall not affect in any respect the determination of whether any person other than an issuer is a “seller” for purposes of section 12(a)(2) of the Act.

(b) *Definition of by means of for purposes of section 12(a)(2) of the Act.* (1) For purposes of section 12(a)(2) of the Act only, an offering participant other than the issuer shall not be considered to offer or sell securities that are the subject of a registration statement by means of a free writing prospectus as to a purchaser unless one or more of the following circumstances shall exist:

(i) The offering participant used or referred to the free writing prospectus in offering or selling the securities to the purchaser;

(ii) The offering participant offered or sold securities to the purchaser and participated in planning for the use of the free writing prospectus by one or more other offering participants and such free writing prospectus was used or referred to in offering or selling securities to the purchaser by one or more of such other offering participants; or

(iii) The offering participant was required to file the free writing prospectus pursuant to the conditions to use in Rule 433 (§ 230.433).

(2) For purposes of section 12(a)(2) of the Act only, a person will not be considered to offer or sell securities by means of a free writing prospectus solely because another person has used or referred to the free writing prospectus or filed the free writing prospectus with the Commission pursuant to Rule 433.

[70 FR 44805, Aug. 3, 2005, as amended at 74 FR 4584, Jan. 26, 2009]

§ 230.160 Registered investment company exemption from Section 101(c)(1) of the Electronic Signatures in Global and National Commerce Act.

A prospectus for an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et*

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seq.) that is sent or given for the sole purpose of permitting a communication not to be deemed a prospectus under section 2(a)(10)(a) of the Act (15 U.S.C. 77b(a)(10)(a)) shall be exempt from the requirements of section 101(c)(1) of the Electronic Signatures in Global and National Commerce Act.

[65 FR 47284, Aug. 2, 2000]

§ 230.161 Amendments to rules and regulations governing exemptions.

The rules and regulations governing the exemption of securities under section 3(b) of the Act, as in effect at the time the securities are first bona fide offered to the public in conformity therewith, shall continue to govern the exemption of such securities notwithstanding the subsequent amendment of such rules and regulations. This section shall not apply, however, to any new offering of such securities by an issuer or underwriter after the effective date of any such amendment, nor shall it apply to any offering after January 1, 1959, of securities by an issuer or underwriter pursuant to Regulation D or pursuant to Regulation A as in effect at any time prior to July 23, 1956.

[23 FR 4454, June 20, 1958]

§ 230.162 Submission of tenders in registered exchange offers.

(a) Notwithstanding section 5(a) of the Act (15 U.S.C. 77e(a)), an offeror may solicit tenders of securities in an exchange offer before a registration statement is effective as to the security offered, so long as no securities are purchased until the registration statement is effective and the tender offer has expired in accordance with the tender offer rules, and either:

(1) The exchange offer is subject to § 240.13e-4 or §§ 240.14d-1 through 14d-11 of this chapter; or

(2) The offeror provides withdrawal rights to the same extent as would be required if the exchange offer were subject to the requirements of § 240.13e-4 or §§ 240.14d-1 through 14d-11 of this chapter; and if a material change occurs in the information published, sent or given to security holders, the offeror complies with the provisions of § 240.13e-4(e)(3) or § 240.14d-4(b) and (d)